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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. _____

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S. A.
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF CASE

Respondents agree with the statement of the case presented in petitioner's petition as to the factual sequence of events indicated on pages 3 through 5. Respondents disagree with petitioner's accusations that there were any "gross misrepresentations" of fact to the District Court subsequent to the initial entry of the default by the Clerk of the District Court or any "calculated misrepresentation to the judiciary." Reasons for inconsistencies between respondent's initial motion to set aside the default and counsel's later affidavit were fully explained to the District and Appellate Courts to the satisfaction of those Honorable Judges, and those courts accepted such explanation as constituting "good cause."

REASONS FOR DENYING THE PETITION

Petitioner has now had an opportunity to air his accusations of alleged "gross" and "calculated "misrepresentations by counsel for respondents before four Judges, including the trial Judge and three Appellate Judges of the Fifth Circuit Court of Appeals. Not one of those four Judges has agreed with petitioner that respondents' counsel's conduct was as characterized. Petitioner now seeks a "third strike" before this Honorable Court to attempt to win his case without the necessity of going to trial on the merits. While the initial appeal was pending in the Fifth Circuit, petitioner moved for a continuance of the trial hoping that the Fifth Circuit might seriously entertain petitioner's position that the order setting aside the default constituted an abuse of discretion. (App. p. 1). Unable to convince the Fifth Circuit of the magnitude of respondents' counsel's sins and indeed unable to

convince that Court that the order setting aside the default was appealable (see the order of the Appellate Court, petitioner's Appendix, page 2), petitioner then solicited counsel for the parties to join with him in another motion to continue the trial because of petitioner's uncertain physical condition. (App. p. 3). This case *still* has not gone to trial and, in fact, is not even scheduled for trial at this time.

Petitioner based his initial appeal jurisdictionally on 28 U.S.C. §1292(a)(3) which is set forth in full in the appendix to petitioner's brief at page 20. Realizing that his position based on the statute was not sound, petitioner's counsel at oral argument requested that the Court treat the appeal as a petition for a peremptory writ as an additional grounds for jurisdiction. The Appellate Court found that the order setting aside the default was not appealable and as such should be dismissed, but treating the appeal as a petition for mandamus, the Court further found that there was no abuse of discretion. (Petitioner's appendix, page 2). Thus the Appellate Court chose to conserve judicial time and effort and disposed of the matter on the merits. The petition presently before this court represents petitioner's third attempt to argue with indignation the purported acts of misfeasance on the part of respondents' counsel, and more importantly to him, to win his case without the necessity of trying it on the merits.

This Court long ago in *Ex parte Lau Ow Bew*, 141 U.S. 583, 12 S. Ct. 43 (1891) and *In re Woods*, 143 U.S. 202, 12 S. Ct. 417 (1892), held that the Court's discretion to issue a writ of certiorari should be exercised only in situations where questions of gravity and general im-

portance are involved. In *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 79 S. Ct. 921 (1959), Mr. Justice Frankfurter discussed comprehensively the philosophy of certiorari jurisdiction. He quoted Mr. Chief Justice Taft who was explaining the past practices of this Court with respect to certiorari jurisdiction to the Committee on the Judiciary of the House of Representatives:

> "'No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.'"

In *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S. Ct. 531 (1923) Mr. Chief Justice Taft stated:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court *merely to give the defeated party in the Circuit Court of Appeals another hearing.*" (Emphasis added).

See also *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 36 S. Ct. 269 (1916); *Forsyth v. City of Hammond*, 166 U.S. 506, 17 S. Ct. 665 (1897).

Respondent has found no case in which this Court has specifically stated that it accepted certiorari on the grounds that the Appellate Court ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of that court's power of supervision." Rule 19 of the Rules of this Court. This, of course, is the consideration on which petitioner bases his grounds for certiorari jurisdiction. Decisions too numerous to set forth herein have consistently held that to set aside or not to set aside a default is wholly within the discretion of the trial court. Reason and logic dictate that the exercise by this Court of certiorari jurisdiction on the grounds that the Appellate Court "departed from the accepted and usual course of judicial proceedings" could not contemplate review of a discretionary act of a trial judge.

The Rules of this Court do not allow motions to dismiss petitions for certiorari. If such motions were entertained, a motion to dismiss the petition as frivolous would have been an appropriate response, for frivolous it certainly is.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SMATHERS & THOMPSON

By JAMES W. CRABTREE

James W. Crabtree

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three copies of the foregoing Brief in opposition to petitioner's petition for a writ of certiorari was mailed to FELDMAN AND ABRAMSON, Attorneys for Petitioner, 402 Ainsley Building, Miami, Florida this 12 day of February, 1973.

JAMES W. CRABTREE

APPENDIX

[TITLE OMITTED]

PLAINTIFF'S MOTION FOR STAY OF PRE-TRIAL AND TRIAL PROCEEDINGS PENDING APPEAL

Plaintiff, STEVE RUSS, move this Honorable Court, pursuant to Federal Rule of Appellate Procedure No. 8, to grant a stay of the pre-trial and trial proceedings in the Lower Court pending appeal. At this time pre-trial is scheduled for November 8, 1972, and trial is scheduled for November 20, 1972.

Plaintiff presently has lodged in the United States Court of Appeals for the Fifth Circuit an appeal from an interlocutory order in this case. The interlocutory order, which is the subject matter of the appeal, set aside defaults obtained by plaintiff against defendants MIRA and STRAVELAKIS. The appellate case is No. 72-2092 and is presently scheduled for oral argument in New Orleans, Louisiana on November 13, 1972. Attached hereto is a copy of the Notice to Counsel with respect to the oral argument in the Appellate Court. If plaintiff is successful on appeal and the defaults reinstated, the issue of liability against defendant, MIRA, and defendant, STRAVELAKIS, will be resolved and as such a pre-trial and trial proceeding will be a waste of time and effort with respect to these liability questions, which would require the greatest portion of trial time arising out of the issues presented by this cause.

WHEREFORE, plaintiff respectfully requests that a stay of the pre-trial conference and the trial in the Lower Court be granted pending the outcome of the appeal in order to save the time and effort of this Honorable Court and of all parties involved.

MEMORANDUM OF LAW

Federal Rule of Appellate Procedure No. 8 provides that the District Court can enter a stay or injunction pending appeal.

WE HEREBY CERTIFY that true copies of the foregoing motion were mailed to Smathers & Thompson, Attorneys for Mira, Alfred I. duPont Building, Miami, Florida 33131, Underwood, Gillis & Karcher, Attorneys for Eagle Shipping, 150 S. E. 2nd Street, Miami, Florida 33131, and Fowler, White, Humkey, Burnett, Hurley & Banick, Attorneys for Zim Israel, 501 City National Bank Building, Miami, Florida 33130, this 6 day of October, 1972.

(Exhibit 1 and signature omitted)

[TITLE OMITTED]

MOTION FOR POSTPONEMENT OF PRETRIAL AND TRIAL DATES

COME NOW the undersigned parties and move this Honorable Court for a postponement of the pretrial scheduled for December 15, 1972, and/or trial scheduled for January 2, 1972, and for grounds therefor, it is respectfully submitted as follows:

1. The parties appreciate the Court's past courtesies and accommodations, and are not unmindful of same.

2. The Plaintiff has recently undergone his third surgery and both the Court-appointed physician, DR. DONALD DOOLEY, and the treating and operating surgeon, DR. CHRISTIAN KEEDY, feel that a prognosis as to the Plaintiff's medical condition would be premature at this time.

3. It would be very difficult to try the damage aspects of this case when the physicians would not be able to give a clear-cut opinion to the trier-of-facts as to the Plaintiff's current diagnosis and prognosis. Attached hereto and made a part hereof is the most recent report of DR. DONALD DOOLEY, and that of DR. CHRISTIAN KEEDY. The latter report was received this date and transmitted to the Court virtually as soon as same was received.

WHEREFORE, it is respectfully submitted that the pretrial and trial of this cause be deferred for a period of approximately six months in order that the medical picture might be clarified as a result of sufficient time having elapsed since the claimant's third back surgery.

DATED this 13 day of December, 1972.

(Signatures and Exhibits omitted)